## MOHAMED BIN ABDULLAH v. CHAH HEA SENG

**[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Abdul Hamid F.JJ.) February 4 & September 2, 1980]**

**[Johore Bahru — Federal Court Civil Appeal No. 171 of 1978]**

*Torts — Negligence — Collision between two vehicles travelling in opposite directions — In absence of special circumstances, presumption is that both drivers negligent.*

This was an appeal from the decision of the learned trial judge who held against the appellant in an action for damages for injuries sustained by him when the motorcar in which he was driving collided with a motor lorry driven by the respondent which came from the opposite direction. The learned judge was not prepared to decide merely on the demeanour of the parties and considered the "corroborative evidence."

**Held:** (1) the decision of the learned judge was clearly not a specific finding of fact but a finding of facts which were really inferences drawn from facts specifically found and the appeal court was at liberty to form an independent opinion on the conclusion which should reasonably be drawn;

(2) the principle that where there is a collision between two vehicles travelling in opposite directions, then in the absence of special circumstances there is a *prima facie* presumption that both drivers are negligent and the onus falls on each of them to show that the other rather than himself is negligent was applicable in this case; (3) in this case the proper course is to hold that each driver was 50% to blame.

*Cases referred to:-*

(1) *Benmax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370.

(2) *Baker* v. *Market Harborough Industrial Co-operative Society Ltd.* [1953] 1 W.L.R. 1472.

(3) *Ong Yam Chong & Anor.* v. *Chan Wah* [1962] M.L.J. 184.

FEDERAL COURT.

*Tee Eng Tuan* for the appellant.

*Hilary D'Cruz* for the respondent.

*Cur. Adv. Vult.*

**Wan Suleiman F.J.** (delivering the judgment of the Court): This is an appeal against the appellant/plaintiff's action for damages for injuries sustained by him when the motor car in which he was driving collided with a motor lorry driven by the respondent/defendant which came from the opposite direction.

As is to be expected in actions of this sort, the learned trial judge had two conflicting versions of the accident to consider. The appellant claimed that the respondent's lorry had encroached on to his side of the road. On seeing this he had swerved to his right simultaneously applying his brakes, but was yet unable to avoid the collision.

Respondent's version was that he saw the appellant coming from the opposite direction and when the latter was negotiating a bend, appeared to lose control and encroached on to respondent's side of the road. To avoid collision the respondent swerved to his right, but appellant then swerved his car back towards his (appellant's) side of the road resulting in the collision.

Having taken note of the opposing versions, the learned trial judge, who was clearly not prepared to decide merely on the demeanour of the two decided to consider more closely what he described as "any corroborative evidence" in order to make up his mind.

Firstly, he examined the sketch plan prepared by one Insp. Shaaban the police officer who investigated this accident, and who was called as a witness for the appellant. This sketch plan (at page 47) indicated that respondent's lorry had crossed the white dividing line on to appellant's side of the road, and also showed brake marks apparently made by the rear offside tyre of the lorry.

Scrutinising the photographs taken by another witness called by appellant, a Police Sgt., his Lordship noted that the two items of evidence showed discrepancies. From the sketch plan it would appear, he said, that the whole of the lorry had gone over the centre white line. One photograph (which we will refer to as the middle photograph on page 50 of the Appeal Records) shows that the nearside rear wheel was still on the correct side of the road. He also noted that on the sketch plan the brake marks start from the left side of the white line, then crossing well over onto its right side, whilst the photograph (the bottom one on page 49) stopped at the centre white line.

We ourselves note, having made due allowance for the limited clarity of these points that the brake marks, far from stopping short there, appear to cross the white line to the right (the offside) of the lorry.

The trial judge then proceeded to compare the photographs produced by the police on behalf of the appellant with two produced by one Lim Keng Hua, a school teacher and part-time newspaper reporter (page 67), who appeared as witness for the respondent, and remarked that these showed a marked difference between the position of the two vehicles. His Lordship remarked that the lorry as shown on the relevant police photograph was more to its wrong side of the road which would, he thought, lend support to appellant's allegation that it had encroached on to his half of the road.

Lim's photograph, he said showed the car to be "diagonally facing left" with its rear nearside wheel on the left side of the centre white line. A considerable part of the lorry was shown to be on its correct side of the road with the rear nearside wheel very close to the edge of the correct side (for the lorry) of the road.

The conclusion the trial judge therefore arrived at was that one of these vehicles must have been moved (from the position in which it had come to rest after collision) before one particular set of photographs had been taken. He concluded that those taken by the police must be the ones taken *after* such movement, simply because the crowd of onlookers present in Lim's 2 photographs were conspicuous by their absence in the police photographs. He concluded that Lim could not have taken his pictures after the vehicles had been moved because "it is impossible for him to move them especially with the crowd still around the scene."

The position of the lorry in Lim's photographs and the damage to the lorry (centre part of front bumper) and the car (offside front portion) inclined him to the view that on the balance, respondent's story was to be believed and therefore he held that the appellant was wholly to be blamed.

The decision of the learned judge was clearly not a specific finding of fact but a finding of facts which are really inferences drawn from facts specifically found, and on the principles enunciated in *Benmax* v. *Austin Motor Co. Ltd.*,[1] we feel more at liberty to form an independent opinion on the conclusion which should reasonably be drawn.

Making allowances for the well-known fact that it is difficult to judge distances from photographs alone, we agree that there seems to be appreciable difference between the relative positions of the vehicles in the photographs produced by the police and those produced by the part-time reporter.

Let us next consider the testimony of Sgt. Yusof PW2. His evidence that he had arrived at the scene at about 9.30 a.m., and had taken the relevant photographs before the vehicles were moved went unchallenged. Moreover he said that he remained at the scene until both vehicles had been towed away.

No questions were put to this witness then or later, after the defence had produced their photographs, as to why the onlookers did not appear in the photographs he produced. It is not difficult to surmise that the police were in a position to ask onlookers to move aside so as to obtain the clearest photographs possible.

It appears from Lim's own testimony that in all probability he had taken his photographs after the police had taken theirs. It seems to us that the probabilities are that Lim's photos were therefore taken after the vehicles had been moved prior to their being towed away.

The learned trial judge, regrettably did not say why he thought PW2 a police sergeant should perjure himself, particularly in an action in which he has no personal interest. The fact remains that whichever set of photographs is favoured does not obviate the fact that the two vehicles had collided roughly in the centre portion of a rather narrow road.

We are of the view that the principles enunciated in *Baker* v. *Market Harborough Industrial Cooperative Society Ltd.*,[2] followed by our Court of Appeal in *Ong Yam Chong & Anor.* v. *Chan Wah*[3] that where there is a collision between two vehicles travelling in opposite directions then in the absence of special circumstances there is a *prima facie* presumption that both drivers are negligent and the onus falls on each of them to show that the other driver rather than himself was negligent, is applicable in this instance.

The learned judge, unable to resolve his doubts had drawn inferences which do not appear to us, with respect, to be tenable, and accordingly we are of the view that the proper course is to hold that each driver was 50% to blame.

On counsel for the parties being so informed the parties came to an agreement as regards damages as follows:

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| Special damages | $1,318 |
| General damages | $14,000. |

The appeal was accordingly allowed, the damages to be as agreed, appellant awarded half the costs both in the court below and in this court and appellant's deposit was refunded.

*Appeal allowed.*

Solicitors: *Murphy & Dunbar; Vohrah & Tan Chee Lan.*

## ARUMUGAM PILLAI v. GOVERNMENT OF MALAYSIA

**[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Salleh Abas F.JJ.) August 5, 6 & September 4, 1980]**

**[Kuala Lumpur — Federal Court Civil Appeal No. 185 of 1978]**

*Revenue Law — Income Tax — Incorrect return or information by tax payer — Imposition of penalty — Recoverable as tax — Default in payment of tax — 10% Increase on amount or balance of tax — Application for declaration that imposition of penalties should not have been made pending appeal to Privy Council — Declaration that levy of 10% increase for late payment was ultra vires and void — Declaration that revenue not entitled to claim penalty in respect of year 1972 — Application to strike out statement of claim on grounds that it disclosed no reasonable cause of action and was frivolous and vexatious and an abuse of process of court — Application granted by Judge after summons adjourned to court — Whether appeal lies — Clear provisions in legislation — Penalties and increases validly imposed and recoverable before appeal to Privy Council disposed of — Application for declarations struck out — Deduction for Singapore losses — Income Tax Ordinance, 1947, ss. 82, 91(1) — Income Tax Act, 1967, ss. 103(4), 113(2) — R.S.C., 1957, O. 25 r. 4 and O. 54, rr. 22 and 22A — Courts of Judicature Act, 1964, s. 68(2) — Federal Constitution, art. 96.*

*Practice and Procedure — Application by summons in chambers to strike out statement of claim — Summons adjourned to open Court — Application granted by Judge — Whether appeal lies without application for further argument or certificate that no further argument required — R.S.C., 1957, O. 54 rr. 22 and 22A.*

In this case as a result of back-duty investigation notices of additional assessment of tax were served on the appellant. From these assessments, the appellant appealed to the Special Commissioners who made further increases ([1956] 4 M.L.J. 95). The appeal by way of case stated to the High Court was dismissed ([1977] 1 M.L.J. 67) and so was the appeal to the Federal Court ([1977] 2 M.L.J. 63). An appeal to the Yang di-Pertuan Agong was awaiting the advice of the Privy Council. In exercise of powers under the Income Tax Ordinance and The Income Tax Act, the Director-General of Income Tax imposed penalties and levied the increases for the years 1953, 1957-1962, 1966-1972. Notices of the additional demands were issued on January 24, 1976.

The appellant sought declarations that the imposition of the penalties should not be made since there was pending an appeal to the Privy Council and the matter was *sub judice* and further that it was *ultra vires* and void. He also sought other declarations that the levy of a 10% increase for late payment was *ultra vires* and void. A further declaration was sought that Revenue was not entitled to claim the penalty in respect of the year 1972.

The respondent thereupon applied by a summons in chambers to strike out the statement of claim and to have the action dismissed on the grounds that it disclosed no reasonable cause of action, it was frivolous and vexatious and an abuse of the process of the courts. The summons was adjourned into court for hearing and the learned judge made the order sought for in the summons. The appellant thereupon appealed to the Federal Court.

**Held:** (1) the "any order" referred to in rule 22A of the Rules of the Supreme Court must on a proper construction and in the absence of any words of limitation mean and include a final order so that if it is made in chambers or by